STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 12, 2005
v TYRONE LAROY WOODFORK, Defendant-Appellant.	No. 255633 Kent Circuit Court LC No. 03-007935-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v HOWARD LATRELL DUBOIS, Defendant-Appellant.	No. 255634 Kent Circuit Court LC No. 03-007933-FC

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendants Tyrone Woodfork and Howard DuBois were both convicted by a jury of armed robbery, MCL 750.529, which occurred when a Pizza Hut delivery driver was held up at gunpoint while attempting to make a delivery to an apartment in Grand Rapids. Woodfork was sentenced as a third habitual offender, MCL 769.11, to 10 to 40 years' imprisonment. DuBois was sentenced to 5 to 25 years' imprisonment. Defendants appeal as of right, and we affirm.

Woodfork argues that trial counsel was ineffective, where counsel failed to assert spousal privilege relative to the testimony of Woodfork's wife, and where counsel failed to request a jury instruction pursuant to CJI2d 7.8. With respect to CJI2d 7.8, Woodfork also argues that the court erred in failing to give the instruction *sua sponte*.

Whether a person has been denied effective assistance of counsel is a mixed question of fact, which is reviewed for clear error, and constitutional law, which we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-

600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In regard to the spousal privilege argument, MCL 600.2162(2) and (7), which are relied on by Woodfork in support of his position, clearly indicate that the privilege belongs to the testifying spouse, not the defendant spouse. See *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004); *People v Dolph-Hostetter*, 256 Mich App 587, 589; 664 NW2d 254 (2003). MCL 600.2162(2) and (7) provide in pertinent part:

> (2) In a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent . . .
>
> * * *
>
> (7) [A] married person or a person who has been married previously shall not be examined in a criminal prosecution as to any communication made between that person and his or her spouse or former spouse during the marriage without the consent of the person to be examined.

Therefore, only Mrs. Woodfork's consent was relevant, and there is no evidence in the record showing that she "did not or would not have consented to testifying at trial." *Moorer*, *supra* at 76 (addressing and rejecting similar argument). Defendant Woodfork's consent was irrelevant, and the case law cited by Woodfork on appeal is equally irrelevant as the cases predate the amendment of MCL 600.2162, which amendment, enacted pursuant to 2000 PA 182, changed the law to provide that the privilege belongs solely to the testifying spouse and not the defendant spouse. See *Dolph-Hostetter*, *supra* at 588-589. Accordingly, defense counsel was not ineffective because counsel is not required to raise meritless or futile objections. *Moorer*, *supra* at 76.

With regard to CJI2d 7.8, there was no request for the instruction, and thus the argument is unpreserved for appeal. Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Additionally, reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). As noted above, Woodfork also bootstraps an ineffective assistance of counsel claim for failure to request the instruction. CJI2d 7.8, which concerns eyewitness identification, appears to be an appropriate and pertinent instruction given the circumstances of this case. However, it is conceivable that defense counsel, as a matter of strategy, purposely did not request the instruction. There are portions of the instruction that might be deemed harmful to Woodfork's defense, such as suggesting that the jury consider the distance between the witness and defendants (face to face), the amount of time that had passed between the crime and the identification (minutes later), and other evidence of guilt that supports the identification (clothing and fingerprints). Additionally, the instruction provides that the jury "may use the identification testimony alone to convict the defendant[.]" CJI2d 7.8(5). Moreover, assuming that the failure to give and request the instruction constituted plain error and deficient performance by counsel, Woodfork fails to establish the requisite prejudice and fails to show that he is actually innocent or that the proceedings were tarnished. There was strong evidence of guilt presented by the prosecution, including the presence of defendants' fingerprints on the victim's stolen driver's license, and the general matters discussed in CJI2d 7.8 were already part of counsel's opening statement and closing argument challenging the identification based on the circumstances of the events that transpired, and, therefore, subject to the jury's consideration in determining whether Woodfork was one of the perpetrators. To a great degree, CJI2d 7.8 touches on commonsense considerations in deciding whether an identification was accurate. Reversal is unwarranted.

Next, both Woodfork and DuBois argue that the prosecutor engaged in misconduct during closing arguments. Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, unpreserved issues of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial after examination of the pertinent portion of the record and upon evaluation of the remarks in context. *Abraham, supra* at 272-273.

Woodfork and DuBois assert misconduct where the prosecutor commented on the fact that DuBois' girlfriend did not come to court and testify that she was with him at the time of the crime. DuBois had made a statement to police, heard by the jury, that he was with his girlfriend during the time of the robbery. We find no misconduct as counsel for DuBois opened the door to the prosecutor's comments by way of matters raised in counsel's opening statement.

In *People v Fields*, 450 Mich 94, 112, 115; 538 NW2d 356 (1995), our Supreme Court stated as follows:

> [P]ublished opinions of the Court of Appeals have consistently held that when a defendant advances an alternate theory or alibi, "the prosecution, by commenting on the nonproduction of corroborating alibi witnesses, is merely

pointing out the weakness in defendant's case" and not "improperly shifting the burden of proof to defendant."

* * *

[I]f the prosecutor's comments do not burden a defendant's right not to testify, commenting on a defendant's failure to call a witness does not shift the burden of proof.

* * *

[W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [Citations omitted.][1]

Here, counsel for DuBois, in his opening statement, made the following observations and remarks:

Now, Mr. DuBois is not hot and sweaty, he hasn't been running. He does not have a white skull cap on. He's got a white t-shirt, but he's wearing baggy wind pants, and [the victim] . . . tells the 911 dispatcher that the two assailants are wearing blue jeans. They ask Mr. DoBois where he was, and he says he was around the corner at his girlfriend's house, there he and his girlfriend had had a bologna sandwich, they had gotten high, and then had had sex. He doesn't want to give the name because it's not really his girlfriend, it's a casual acquaintance. . . .

I think when you put it together, you're going to find out that Mr. Scales is probably the assailant . . . .

* * *

My theory of the case is very simple, police arrested the wrong man, the wrong man is in front of you on trial here today.

Whether coined explicit or implicit, DuBois was clearly advancing or blending in, to some extent, an alibi theory as part of his overall defense that there was a misidentification and that he was not one of the perpetrators. DuBois' statement concerning his whereabouts was

[1] The *Fields* Court also stated that advancement of the defendant's alternate theory may be either explicit or implicit for purposes of determining whether the prosecutor is permitted to comment on the theory or nonproduction. *Fields, supra* at 115.

presented as part of the evidence at trial. The prosecutor was not improperly shifting the burden of proof, but merely pointing out a weakness in DuBois' case. Furthermore, the prosecutor was commenting on the nonproduction of the witness and not on DuBois' failure to testify on his own behalf. Because the matter was squarely placed before the jury, regardless of whether DuBois filed a notice of alibi defense, the prosecutor was permitted to make his remarks. Accordingly, there was no basis for a mistrial and no grounds exist for reversal as to both Woodfork's and DuBois' arguments on this issue. Moreover, the trial court, finding the prosecutor's comments objectionable, gave a cautionary-curative instruction to the jury, informing them that defendants had no burden to present any evidence. On the entire record before us, we cannot conclude, assuming the comments to be improper, that defendant was denied a fair and impartial trial.

Woodfork also claims prosecutorial misconduct on the basis of comments that allegedly appealed to racial and ethnic fears and prejudices. This unpreserved issue is reviewed for plain error affecting substantial rights. *Carines, supra* at 763-764. "[T]his Court abhors the injection of racial or ethnic remarks into any trial because it may arouse the prejudice of jurors against a defendant and, hence, lead to a decision based on prejudice rather than on the guilt or innocence of the accused." *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Our review of the comments suggests that the prosecutor was simply and inarticulately attempting to convey the reality that street slang exists within our culture. To the extent that it arguably crossed the line into inappropriate commentary, it did not deny Woodfork his right to a fair and impartial trial, nor did it affect his substantial rights, where there was strong evidence of guilt, the comments were minimal, and where a curative instruction, if requested, could have alleviated any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Reversal is unwarranted.

Next, Woodfork argues prosecutorial misconduct where the prosecutor referenced and described Woodfork's statement to police as being a "confession." On objection, the trial court asked the prosecutor to rephrase the characterization of Woodfork's police statement, and the prosecutor conceded and acknowledged to the jury that there was no confession to the crime. Woodfork was not deprived of a fair and impartial trial in light of these circumstances. Furthermore, Woodfork's argument that the cumulative effect of the prosecutor's various alleged improprieties deprived him of a fair trial lacks merit. The comments regarding the nonproduction of DuBois' girlfriend were not improper and did not pertain to Woodfork. The remarks allegedly interjecting racial and ethnic biases were only arguably improper and minimal, while the comments about a "confession" were satisfactorily cured by the prosecutor himself. The cumulative effect of these comments did not result in the deprivation of a fair and impartial trial.

Finally, DuBois argues that the trial court violated the United States and Michigan Constitutions by sentencing him to 5 to 25 years' imprisonment. We disagree. He claims that the trial court failed to adequately consider his apology, family support, and rehabilitative potential in sentencing him and argues that, as a result, his sentence is cruel and/or unusual in violation of the federal and state constitutions. The 5-year minimum sentence was within the sentencing guidelines range, and pursuant to MCL 769.34(10), we are mandated to affirm the sentence. Of course, a sentence that violates the constitutional principles prohibiting cruel and unusual punishment is subject to reversal. However, the sentence was within the sentencing guidelines and thus presumptively proportionate and not cruel and unusual. See *People v Colon,*

250 Mich App 59, 66; 644 NW2d 790 (2002); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Additionally, in regard to the 25-year maximum sentence, which DuBois also claims is excessive, we find no abuse of discretion, considering that armed robbery is "punishable by imprisonment for life or for any term of years." MCL 750.529; *People v Garza*, 246 Mich App 251, 256; 631 NW2d 764 (2001). The minimum and maximum terms of imprisonment were proportionate in light of the circumstances surrounding the offense and the offender, and a proportionate sentence does not constitute cruel and unusual punishment. *Colon*, *supra* at 65-66. With respect to DuBois' argument that the scoring of some of the sentencing factors violated the principles enunciated in *Blakely v Washington*, 542 US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004), our Supreme Court in *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), determined that Michigan's sentencing system is not affected by *Blakely*. Although the United States Supreme Court has now issued *United States v Booker*, 543 US __; 125 S Ct 738; 160 L Ed 2d 621 (2005)(federal sentencing guidelines subject to jury trial requirements of the Sixth Amendment), and our Supreme Court has decided to directly address *Blakely* and *Booker* and their application relative to sentencing in Michigan, *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005), we decline to explore any implications here because DuBois fails to provide any details whatsoever when claiming that the verdict "did not encompass all the findings made by the trial court in scoring the OV factors. . . ." There is no discussion, recitation, or mention of the particular sentencing factors supposedly at issue and the interplay between the factors and the facts encompassed by the verdict, which facts are also not discussed. It is insufficient for an appellant to simply announce a position or assert an error and then leave it up to this Court to rationalize and discover the basis for his claims, or unravel and elaborate for him his arguments. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998)(citation omitted).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio